. . . . On the Fixing of Boundary Lines

A STATEMENT

THE VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT

SEPTEMBER 9, 1958

THE human conflicts present in the controversy over the South's public schools are real, are complex, and cannot be minimized. Yet the public attention concentrated upon these social problems unfortunately has obscured a towering question of constitutional government, and this question transcends the immediate and personal issues of particular children in particular schools. It is in the hope of encouraging consideration of a basic concept of the American Republic that this Commission, created by the General Assembly of Virginia in 1958, offers this statement.

This basic concept cannot be understood without some recognition of unalterable facts of history and long-established principles of law. Our Union is a union of States. That is what it was in the beginning and that is what it remains today. In this Union, all power to govern flows from the people in their States. Some powers the people have delegated, under the Constitution, to Federal authority; all other powers they have reserved, under the Constitution, to themselves.

We Are Not the Same . . .

There are sound reasons for this. The States are not all the same; their economies, societies, interests, resources, are not all the same; customs and traditions vary enormously from State to State, and laws that might be wise and useful in one area may be demonstrably needless or even harmful in another. This diversity is part of the strength of the Union. It has been recognized as such from the very beginnings of our history, and the underlying theory of the Constitution is that the States are left free to govern themselves, subject only to the prohibitions they have expressly imposed upon themselves by the Constitution.

The States manifest their individual powers in many different ways. Each State, for example, fixes a minimum age at which its citizens may vote; and though some may believe it unwise to permit 18-year-olds to vote, nothing in the Constitution prohibits a State from thus extending its fran-

chise. Similarly, many persons may doubt the soundness of a State law providing for rent control, but a State may adopt such a law if its people choose. Two States, Oklahoma and Mississippi, regard traffic in intoxicating liquors as immoral, and they have prohibited it; but the other 46 States are not compelled to accept this view. Half the States permit pari-mutuel gambling on horse races; the other half do not. The point we seek to emphasize is that a practice which many people may regard as unwise, or unsound, or immoral, is not *unlawful* until it is made so by lawful process. That which some persons conceive to be socially or economically wrong may still be constitutionally right.

The Key Question

Acceptance of this plain truth of our government is vital to any proper understanding of the constitutional issue at stake in the South's public school crisis. The Southern States, or some of them, do not conceive the maintenance of racially separate schools to be morally wrong; on the contrary, they believe this policy to be in the best interests of all their people. That many persons strongly oppose this view is not to be doubted. But the question is *not* whether the Southern States, in exercising a power to maintain such schools, are acting morally or immorally; the question is whether they are acting constitutionally. Distasteful as the conclusion may be to some critics of the South, the conclusion cannot be escaped that the Southern States are fully within their constitutional rights in the position they have taken.

The conflict here, fundamentally, is one of the rights of the citizen and the powers of a State. Whatever the rights of the individual are, these rights cannot be infringed; correspondingly, whatever the powers of the State may be, these powers may be exercised at the State's discretion. In this controversy, as in countless others, the problem rests in determining the line at which rights end, and powers begin; it is a problem in the fixing of boundaries.

We must look to the Fourteenth Amendment to determine where this boundary lies. The Fourteenth Amendment, leaving aside all questions of the validity of its adoption, was conceived primarily as a prohibitory amendment: It was intended to prohibit to the States certain powers they had exercised in the past; specifically, the States were prohibited from denying to any citizen the "equal protection of the laws." Beyond question, the effect of the amendment also was to vest in the newly freed Negro people certain rights they had not enjoyed before—the rights, for example, to own property, to enter into contracts, and to sue and be sued.

What Added? What Subtracted?

The constitutional issue now before the country, in this context, is simply stated. So far as public schools are concerned, what individual rights were created? What State powers were reduced? If in 1868 certain rights were added to those possessed by the citizen, then in 1868 certain powers

must have been subtracted from those held by the States. What did the amendment mean in terms of public schools?

Clearly, the Congress that framed the Fourteenth Amendment, and the States that ratified it, never intended for an instant that a guarantee of "equal protection of the laws" was to affect the operation of separate schools in any way. Long after the amendment was ratified, States both North and South continued to maintain racially separate institutions. It is unthinkable that they understood the Amendment to prohibit them from the exercise of powers they were daily exercising.

The correctness of this understanding was confirmed repeatedly by the highest State and Federal courts in an unbroken line of decisions stretching over many years. It was confirmed, also, by the tacit acquiescence of the States themselves. When the doctrine of "separate but equal" was announced by the Supreme Court of the United States in 1896, not a single State voiced a protest or asserted a misinterpretation of the Amendment. And Congress, from the date of the Amendment until the date of the School Segregation cases, demonstrated its understanding of the Amendment by actively maintaining separate schools in the District of Columbia. Thus the boundary line was fixed. By what authority may it now be changed?

The Law of the Case

The position of the Southern States today is that the governmental power they exercised constitutionally for so many years—the power to maintain racially separate schools—cannot be prohibited to them by mandate of the Supreme Court. Many persons, it appears, believe that the Court has the *right*, as well as the *power*, to impose this prohibition upon the States as an addition to the "law of the land." In actual fact, the Court's mandate is no more than the "law of the case" in which it is handed down; the Court's power is a judicial power, not a legislative power, and it is worth emphasizing that there is now no law and no provision of the Constitution requiring racially integrated schools. Nevertheless, we acknowledge that some observers believe this to be the effect of the Court's opinion in the school cases. For our own part, we hold that in attempting to prohibit to the States the power to operate separate schools, the Court usurped the amendatory power that constitutionally is vested in three-fourths of the States alone. In effect the Court sought not merely to interpret the Constitution, but substantively to amend the Constitution, and this the Court has no authority to do.

The Virginia Commission on Constitutional Government respectfully urges the people of every State to reflect thoughtfully upon these matters. There are two questions involved in this struggle. The only question properly before the Supreme Court of the United States was whether a State's maintenance of separate schools is constitutional. The other question, whether such schools are morally and socially right or wrong, is a question of policy, not of jurisprudence.

It is our prayer that the people of the United States, whatever their

views on segregation, will reflect carefully upon the consequences of entrusting the formation of national social policies to a judicial body appointed for life. We cannot believe that our sister States, viewing the matter dispassionately, will fail to perceive the grave danger to all State powers that lies in the Court's drastic action here.

'It Is Not for the Court . . .'

These apprehensions are not peculiar to the South in 1958; Washington voiced them in his Farewell Address. Lincoln many times emphasized the same points. More recently, Mr. Justice Black has asserted that it is not for the Supreme Court "to roam at large in the broad expanses of policy and morals, and to trespass on the legislative domain of the States." Mr. Justice Douglas has warned that "instability is created" when "a judiciary with life tenure seeks to write its social and economic creed into the Charter." Mr. Justice Frankfurter has declared that, "As a member of this Court, I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard." The late Chief Justice Vinson emphasized that because the Court must rest its decisions "on the Constitution alone, we must set aside predilections on social policy and adhere to the settled rules which restrict the exercise of our power to judicial review." Holmes, Hughes, Sutherland, Harlan, Taney, among a host of great jurists, have insisted down through the years on strict adherence to the rule, in Hughes' phrase, that *"it is not for the Court to amend the Constitution by judicial decree."*

We should like also to direct attention to the words of Elihu Root, recently proclaimed as "sound doctrine" by the Conference of Chief Justices of the several States:

"If the people of our country yield to impatience which would destroy the system that alone makes effective these great impersonal rules and preserves our constitutional government, rather than to endure the temporary inconvenience of pursuing regulated methods of changing the law, we shall not be reforming. We shall not be making progress, but shall be exhibiting . . . the lack of that self-control which enables great bodies of men to abide the slow process of orderly government rather than to break down the barriers of order when they are struck by the impulse of the moment."

Let us not abandon these wise admonitions in the passions of a turbulent hour.

Extra copies of this statement may be obtained on request to the Virginia Commission on Constitutional Government, State Capitol, Richmond, Virginia.